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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 809

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington corporation, OREGON TRUNK RAILWAY, a Washington corporation, and OREGON ELECTRIC RAILWAY COMPANY, an Oregon corporation,

Petitioners,

v.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, a voluntary unincorporated association, T. M. DELANEY, individually and as General Chairman, LEO HOLZACHUH, EARL A. JONES, E. O. BUDAHL, and M. H. MEISTRELL, individually and as Local Chairmen,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment entered by the United States District Court for the District of Oregon.

OPINIONS BELOW

The District Court made Findings of Fact and Conclusions of Law (R. 100-115), but in the course of the hearing on the temporary injunction voiced an opinion on the dispute (Tr. 28-31, Appendix A hereto, *infra* pp. 1-3. The opinion of the Court of Appeals is reported at 366 F.2d 99, and is contained in the Transcript of Record (R. 136-149), but is printed in Appendix B hereto for readier reference (pp. 4-23).

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1966. A petition for rehearing, filed on September 15, 1966, was denied on September 30, 1966. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. A railway union requests the services of the National Mediation Board on the ground that a "major dispute" is involved. In reply to the Board's inquiry, the carriers advise the Board that in their opinion only a "minor dispute" to be settled by the National Railroad Adjustment Board has arisen.

Thereafter, a federal court of appeals determines that the dispute was a "major dispute," so as to preclude injunctive relief against a threatened strike.

Under these circumstances, are the carriers foreclosed from invoking the Railway Labor Act to enjoin the union from striking until after the mediation procedures of the Act, including the proffer of arbitration, have been completed?

2. Railway unions and carriers enter into a national agreement regarding work rules and providing for "suitable lodging or an equitable allowance in lieu thereof" for certain road service crewmen, leaving specific application of that agreement to be "worked out on a local basis." The local union thereafter delivers a notice outlining particular standards which in its opinion would provide "acceptable, suitable lodging," and a dollar amount which would constitute an "equitable allowance in lieu thereof."

Did such a notice create a "minor dispute," growing out of the interpretation or application of the national agreement, under Section 3, First, of the Railway Labor Act (45 U.S.C. § 153, First (i)), and subject to final adjudication by the National Railroad Adjustment Board?

STATUTES INVOLVED

Section 3, First (i), of the Railway Labor Act (45 U.S.C. § 153) provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases

pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 6 of said Act (45 U.S.C. § 156) provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

STATEMENT OF THE CASE

This action for injunctive relief brought under 28 U.S.C. § 1337 has its origin in long-standing nationwide carrier-union disputes over railroad working rules. The issue here, "allowances away from home" to be paid to crews held away from home terminals, was only one of a multitude of recent controversies between operating brotherhoods (including ORC&B) and carriers (including petitioners) throughout the United States. From 1959 through 1963 the mediation procedures of the Railway Labor Act, a Presidential Railway Commission, direct intervention by Presidents Eisenhower and Kennedy, and many mediators and arbitrators of national distinction, failed to resolve these issues.

The threat of a national strike finally impelled the Congress to enact Public Law 88-108, compelling agreement or arbitration on the firemen and crew consist issues, and directing further negotiations on

all remaining ones, including "allowances away from home." When the carriers and brotherhoods still were unable to resolve their differences on these latter and a national strike again threatened, President Johnson called the parties to the White House; shortly thereafter, on June 25, 1964, they reached a national agreement, called the "White House Agreement," resolving all work rules issues left out of Public Law 88-108, including the granting of "suitable lodging at the carrier's expense or an equitable allowance in lieu thereof," the terms to be worked out within 30 days "on a local basis." Article VII of that Agreement said:

> "Any disputes involving the interpretation or application of this Agreement shall be settled by the parties in accordance with the established procedures therefor, including the creation of Special Boards of Adjustment and other proceedures of Section 3 of the Railway Labor Act."

The 30-day period prescribed in the White House Agreement would expire on July 25, 1964. The parties here had been unable to agree upon the application of the national standard on petitioners' property. Petitioners therefore put into effect on July 24, 1964 (R. 105, 106) their version of the meaning of this agreement. By letter dated August 3, 1964, respondents advised petitioners of their conflicting version (R. 106-107). Further conferences were held on the issue.

Respondents then requested intervention by the National Mediation Board, which resulted in a statement by petitioners that, because the dispute was

properly over the application and interpretation of the White House Agreement and the settlement procedures quoted above, the Board should reject the request for intervention (R. 110-112).

This suit for injunctive relief was filed following respondents' strike notice of June 3, 1965. The United States District Court granted a temporary injunction preventing respondents from striking, on the ground that the dispute was a "minor dispute" under the provisions of the Railway Labor Act and that a strike to compel agreement was unlawful. The United States Court of Appeals for the Ninth Circuit, by a divided vote of two to one, reversed (R. 136-149), holding that the dispute here involved was a "major dispute" and, further, that petitioners were foreclosed from contending that respondents could not strike until the Act's mediation process through the Mediation Board had been exhausted, including the Board's proffer of arbitration at the end.

The dispute was first submitted by the petitioners to a Special Board of Adjustment and thereafter to the National Railroad Adjustment Board, First Division, for determination (R. 114), as provided by the White House Agreement and Section 3 of the Railway Labor Act.

REASONS FOR GRANTING THE WRIT

Important questions as to the proper interpretation of the Railway Labor Act are directly presented; the decision of the court below is an

unwarranted extension of *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R.R. Co.*, 321 U.S. 50, and would allow a union to resort to self-help without exhausting any of the mediation or arbitration procedures provided by the Act.

I

In the *Toledo* case, this Court held that under Section 8 of the Norris-LaGuardia Act a railroad was not entitled to an injunction against a strike because the road had refused to submit a "major dispute" to voluntary arbitration. The authority of that holding was recently recognized in *Brotherhood of Ry. and S.S. Clerks* v. *Florida East Coast Ry. Co.*, 384 U.S. 238, n. 8, where the Court underscored the extreme consequences to our complex society of a stoppage of rail service, as well as the strong public policy in leaving unfettered the processes of bargaining and mediation called for by the Railway Labor Act.

However, the court below by its unwarranted extension of the *Toledo* case, has created a situation here, and a precedent for the future, which gives the union freedom to resort to self-help without first exhausting any of the procedures of the Railway Labor Act.

This extreme penalty, and the consequences of a crippling strike, are now to be visited upon a carrier who, in good faith, has treated a dispute as a "minor dispute," only later to find that a federal court of appeals disagreed.

The record is undisputed that petitioners did not reject mediation in replying to the National Mediation

Board's usual request for its views on the invocation of the Board's services. Its reply was that in its opinion this was a minor dispute cognizable by the National Railway Adjustment Board to which, if unresolved, it would be referred. In expressing these views (R. 110-112) petitioners did not in any sense reject the peaceful methods provided by the Act for settling disputes, but were invoking the express terms of Article VII of the White House Agreement, which referred to Section 3 of the Act.

Petitioners' good faith expression of their views to the National Mediation Board as to the character of this dispute permits respondents to strike if this Court now refuses to review the question of whether a "major dispute" or a "minor dispute" is presented. Thus self-help is available to respondents though no mediation efforts have been undertaken by the Board, followed by the required proffer of arbitration.

Such consequences, arising out of the wrong guess by the carrier as to whether the Adjustment Board or the Mediation Board has jurisdiction over a particular dispute, directly thwart the entire scheme and spirit of the Railway Labor Act.

Assuming for purposes of argument that a "major dispute" was involved, this Court should allow the petition for the purpose of remanding this case to the court below with a direction that the parties be required to exhaust the mediatory procedures of the Railway Labor Act.

II

The majority of the court below departed from this Court's classification of "major disputes" and "minor disputes" in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 722-724. The former

> ". . . relates to disputes over the formation of collective bargaining agreements or efforts to secure them. . . . where there is no such agreement or where it is sought to change the terms of one, . . . They look to the acquisition of rights for the future. . . ."

The latter

> ". . . contemplates the existence of a collective agreement already concluded or . . . a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

Succinctly stated, the "White House Agreement" was nationwide and provided for payment by the carrier of a crew's expenses away from home in the form of "suitable lodging" at the carrier's expense, or "an equitable allowance in lieu thereof." This collective bargaining agreement gave the unions something they never had before and thus looked only to the future. The defining of what lodging is "suitable," or what allowance is "equitable," looks to the interpretation of rights already obtained and the proper application of these particular contractual provisions to a specific local situation.

The dissenting opinion of Judge Duniway on this phase of the case correctly points out that the effect of the majority opinion is to disregard the purposes of Sections 3 and 6 of the Railway Labor Act, as well as the language and purpose of the 1964 White House Agreement, particularly Article VII, relating to the settlement of disputes involving its interpretation or application pursuant to the procedures of Section 3.

The important questions of the proper interpretation of Sections 3 and 6 of the Railway Labor Act in this case should be resolved by this Court. They are of immediate and vital concern to many carriers and unions who are parties to nationwide collective bargaining agreements which call for interpretation and application of their terms to particular local situations. The conflict made explicit by the majority and dissenting opinions of the Court of Appeals has not previously been adjudicated by this Court.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Judge William G. East, United States District Judge for the District of Oregon (July 3, 1965)

THE COURT: This matter was presented to the Court in ex parte under the representation that there was a threat which the carrier deemed to be eminent and actual. In hearing the representations made, a temporary restraining order was issued. It was only a matter of a few days after that that the Southern Pacific in this area was struck, and the box cars didn't move around here for two days until this Court issued a temporary restraining order; and apparently, those parties have been able to get together. So I have no qualms about issuing the temporary restraining order.

Now, I have to deal with this problem now, as to whether or not it is to be continued. The plaintiff wants to go before Board 434 on a local level or arbitrate this matter, and the defendants don't want to go there. The plaintiff wants to—the defendants want to go to the Mediation Board on a national level, and the plaintiff doesn't want to go there. I have read somewhere that the dispute as to which agency to go to shouldn't be the stumbling block, but it is apparent to me that this Court is going to have to make a ruling in order to see if somehow these parties can get to arbitration under the guidance of appropriate administrative agencies. They can't do it across counsel table, apparently.

I have had an opportunity to study the briefs that were filed. I spent most of the night at it, and with the help now of the representations made by both these able counsel, it tends to clarify my thinking and pinpoints things to me; and I have come to a firm conclusion about it, right or wrong.

I am going to deal now with the letter of August [3], 1964, signed by Mr. Delaney, addressed to the plaintiff. Let's see if we can get the thrust of that letter in mind.

"Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include . . .". Now, I am not going to read the balance of it. I am just going to conclude that in no place in that letter is there a demand or a request of the plaintiff to change a single word or character of punctuation in the agreement of [June] 25, 1964. All that this letter purports to do is to ask the plaintiff to subscribe to an interpretation of the provisions of Article 2.

You have stated your position as to what shall constitute suitable lodging. You haven't asked for a change of the language of that contract. So without belaboring it any further, I think that this dispute as it appears from the record before this Court is nothing more or less than an interpretation of what

shall be suitable lodging, or what shall be an equitable allowance in lieu thereof.

The defendant claims that $6 is a suitable allowance. I cannot read that this demand or request of the railroad is to change Article 2 of the agreement to read, instead of the equitable allowance, the words "$6 shall stand in lieu thereof."

So repeating myself, without belaboring the matter any further, this dispute is nothing more or less than an interpretation of Article 2. Article 2 in two places provides that the dispute shall be worked out on a local basis. Now, I cannot read in the letter of August [3rd] that you are making demand upon the plaintiff railroad that the agreement of June 25 shall be amended or changed to read in lieu of the language "shall be worked out on a local basis," the language that "it shall be worked out on a national basis." I can't read that in it. So it seems to me that with that conclusion, it necessarily follows that we are dealing with the so-called judicial expression of a minor dispute, and you should proceed further in these proceedings on that basis.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, etc., et al., *Appellants*, vs. SPOKANE, PORTLAND & SEATTLE RAILWAY CO., et al., *Appellees*.	No. 20,331

[August 18, 1966]

Appeal from the United States District Court for the District of Oregon.

Before POPE, JERTBERG and DUNIWAY, Circuit Judges.

POPE, Circuit Judge.

A dispute arose between the above named Union, and the appellee Railroads concerning allowances to union members for expenses when on duty away from home. When the parties were unable to agree, the Union threatened to strike. The Railroads then brought this suit in the court below to enjoin the strike. From an order granting such an injunction the defendant Union appeals.

Following the extended disputes between numerous railroads and their operating employees relating to rules and working conditions which are recounted in detail in Locomotive Engineers v. B. & O.R. Co., 372 U.S. 284, and in Engineers v. Chicago, R.I. &

P.R. Co., 382 U.S. 423 (January 31, 1966), Congress undertook to avoid the consequences of a threatened strike by the unions through the enactment of provisions for compulsory arbitration of two of the issues between the carriers and the unions. There remained other disputes, not comprehended within this arbitration, which the parties undertook to deal with in what the parties refer to as the "White House Agreement", dated June 25, 1964. The particular portion of that agreement, involved here, was contained in Article II, § 1 thereof, which provided as follows:

> "ARTICLE II—EXPENSES AWAY FROM HOME:
>
> "Section 1—
>
> "When the carrier ties up a road service crew (except short turnaround passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment of four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.
>
> "If an allowance is being made in lieu of lodging as well as other considerations under provi-

sions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this Section shall be made effective at a date no later than 30 days following the effective date of this Agreement."

The lodging referred to is the lodging required by the employees during their layovers at the end of their runs.

At conferences following this agreement the parties attempted to agree on what would be considered "suitable lodging or an equitable allowance in lieu thereof," but without success. On July 24, 1964, the appellee railroads issued and served on the appellants its "Circular No. 65" as follows:

"SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY SYSTEM LINES

Portland, Oregon
July 24, 1964

Circular No. 65

ALL CONCERNED:

Effective July 25, 1964 and until further notice, whenever a road service crew is tied up at a terminal other than the designated home terminal of the crew assigned for four hours or more, each member of the crew so tied up will be provided lodging at the following locations:

Spokane—Coeur d'Alene Hotel
Pasco—Pioneer Hotel
Wishram—SPS Hotel

Bend—Colonial Hotel
Albany—Albany Hotel
Eugene—Lane Hotel
Astoria—Astor Hotel
Seaside—Chillquist Rooming House
Vernonia—Hy-van Hotel

A survey recently taken of lodging then being used by train and enginemen at the above points indicated that while some were using accommodations listed above, others had made different lodging arrangements. Therefore, although accommodations will be available at the above named establishments, if any crew member desires to keep his present arrangement, he may do so in which event he will be allowed $1.50 for each layover period during which he is tied up for more than four hours at the away-from-home terminal of his assignment. This allowance may be claimed on the service slip for the particular trip.

While the above arrangement is in effect, the allowance in lieu of lodging presently being made to certain train crew members in pooled caboose territory will be removed.

J. L. Monahan
Superintendent"

On August 3 following, the union sent to the railroad[1] a notice as follows:

[1] The action was brought by Spokane, Portland & Seattle Railway Company, a Washington corporation, Oregon Trunk Railway, a Washington corporation, and Oregon Electric Railway Company, an Oregon corporation. The last two companies were subsidiaries of the first one named. All three are referred to hereinafter as "the railroad."

"Our negotiations to date have failed to produce an agreement as to the type, quality or location of suitable lodging, or equitable allowance in lieu thereof. We propose that an agreement be reached in accord with Section 6 of the Railway Labor Act, which will provide that acceptable suitable lodging shall include:

"(1) A large single room, well ventilated, heated, lighted, air conditioned, with bath facilities, well finished wood or carpeted floors and closet or large locker storage space. Room is to be equipped with chairs and dresser and full size standard bed with new Simmons 400 mattress and springs, or one of equal quality. Room to be maintained in a suitable manner with linen to be changed after each use.

"(2) The lodging mentioned in Paragraph (1) to be located not more than one-fourth miles from point where crews are required to register and/or off duty, or suitable transportation furnished between lodging and points of reporting for duty, or going off duty. Call service will be provided by carrier.

"(3) In lieu of requirements of above Paragraph (1) and (2), an equitable allowance per trip will be six dollars ($6.00) to be paid by check separate and apart from wages and earnings.

"Please advise me promptly whether you are agreeable to these provisions, or as to a date for conference concerning this proposal, as provided by the Railway Labor Act."

For the purpose of clarifying what next happened,

we note that the Railway Labor Act (45 U.S.C. 151 et seq.) provides two separate and distinct methods for the settlement of disputes between carriers and their employees. Section 3 of the Act (45 U.S.C. § 153) which establishes a National Railroad Adjustment Board provides that disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (45 U.S.C. § 153(i)). Disputes of this character are known as "minor" disputes. Their submission to the National Railroad Adjustment Board is "considered as compulsory arbitration in this limited field," and awards in such cases are "final and binding upon both parties," and in case of attempted violation of such an award through a strike the "District Court has jurisdiction and power to issue necessary injunctive orders . . . notwithstanding the provisions of the Norris-La Guardia Act." Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30.

As the Court there noted, these so-called "minor disputes" may be contrasted with "major disputes"

which result when there is disagreement in the bargaining process for the new contract."[2] In Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711, the Court, at pages 722 to 727, defined and described the two kinds of disputes. Speaking of "major disputes" the Court said (p. 723): "They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."[3] The Court then proceeded to note the divergent procedures prescribed for dealing with the two kinds of disputes. It said (p. 725): " 'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. §7; Train-

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[2] Or where disagreement relates to changes of pay, rules, or working conditions as embodied in existing agreements. See Title 45 U.S.C. § 152 Seventh, which reads as follows: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

[3] The Court described "minor disputes" as follows: "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case, the claim is to rights accrued, not merely to have new ones created for the future."

men v. Toledo, P. & W. R. Co., 321 U.S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

For a case in which this court dealt with the distinctions between these two kinds of disputes, see Butte, Anaconda & P. Ry. v. Brotherhood of L.F. & E., 9 cir., 268 F.2d 54.

After the railroad and the Union had exchanged their two notices, quoted above, the railroad's notice of July 24 and the Union's notice of August 3, 1964, they had conferences in an attempt to resolve their differences, but without success. Not only were they unable to agree upon what allowance or lodgings "away from home" should be furnished, but they were in sharp disagreement as to the character or nature of their dispute, and as to the steps necessary to be taken in an effort to resolve it. It will be noted that in its August 3 notice the Union referred to an

agreement to be reached "in accord with Section 6 of the Railway Labor Act." This section (45 U.S.C. § 156) deals with a "major dispute." By letter of August 10, 1964, the railroad challenged this reference to § 6, asserting that this was a dispute "involving the interpretation or application" of Article VII of the agreement of June 25, 1964. About the same time the Union invoked mediation on the part of the Mediation Board. The Mediation Board took no action at that time, apparently because it was advised that the parties, as of September 15, 1964, agreed to maintain the status quo pending further negotiations. This agreement operated to bring about a cancellation of a strike which the Union was then threatening.

There followed a succession of efforts to reach agreements, all without success, and finally, about June 2, 1965, the Union notified the Mediation Board that because of the railroad's "refusal to bargain realistically on our Section 6 notice of August 3, 1964," the Union had authority to strike. The Mediation Board notified the railroad of this, and the Union notified the railroad it would strike on June 7, 1965. On June 3, 1965, the railroad submitted its version of the dispute to a Special Board of Adjustment which the parties had set up by agreement in October 1961. When the Union objected to the submission of the dispute to such Special Board the railroad submitted the stated dispute to the National Adjustment Board.

It is the railroad's position that "this dispute was and is one involving only the interpretation of an existing agreement" between the parties, as set forth in Article II, Section 1 of the June 25, 1964 White House Agreement; hence, it is a "minor dispute" which the Adjustment Board had jurisdiction to determine by an award which would be final and binding upon both parties. It follows, the railroad says, and the trial court held, that the strike was "unlawful and enjoinable."[4]

If the dispute here involved was a "major" one, the strike was not subject to injunction. As we noted in Butte, Anaconda & P. Ry. Co. v. Brotherhood of L.F. & E., supra, at p. 58, "Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to self-help."

We are thus confronted with the single question, whether this case involves a "major" or a "minor" dispute. It may be assumed, but without deciding, that both parties might have agreed to submit to the

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[4] Counsel for the railroad have furnished us with an opinion of the District Court for the District of Minnesota in a case entitled Great Northern Railway Company v. Order of Railway Conductors and Brakemen, et al., dated March 9, 1966, and so far unreported. In that case, not distinguishable from this one, the court granted an injunction for reasons similar to those stated by the court below. Our decision here discloses that we cannot agree with that decision either.

Adjustment Board the simple question as to the meaning, or proper interpretation, of what would be "suitable lodging or an equitable allowance in lieu thereof." But the Union had the right, if it chose, to seek an addition of new provisions to this part of the White House Agreement. The Railway Labor Act contemplates such changes in or additions to agreements. Section 6 of the Act (45 U.S.C. § 156) is entitled: "Procedure in changing rates of pay, rules, and working conditions." The only restrictions there stated are that there should be "thirty days' written notice of an intended change," and that if conferences are being held, or, if services of the Mediation Board have been requested, the proposed changes shall not go into effect until after a stated period following termination of conferences, or until mediation has been completed.

In our view, there can be no question but that the Union's notice of August 3, 1964, was a notice of an intended change in the terms of the agreement. That it was so intended is made plain by its recital that it was proposed "that an agreement be reached in accord with Section 6 of the Railway Labor Act." This notice did not purport to be a proposed interpretation of the earlier Article II, Section 1; its proposals are obviously new arrangements. That Article II Section 1 contemplated that there would be some new provisions made is apparent from its reference to certain terms being "worked out on a local basis." This seems to us to suggest further negotia-

tions.[5] We hold this to have been a "major" dispute.

The railroad suggests that even if this were a major dispute, yet the Union had no right to resort to self-help by way of strike until mediation through the Mediation Board had been undertaken, followed by at least an attempt at arbitration under Section 7 (45 U.S.C. § 157). But the railroad is in no position to make such a contention. The Union made an effort to utilize the procedures of the Mediation Board. In response to the Union's notice of August 3, 1964, the railroad advised the Union that it considered that notice improper, indeed a "specific violation of the Agreement." In response to an inquiry by the Mediation Board as to its views of the Union's invocation of mediation, the railroad replied that it was continuing negotiations concerning the dispute. Later, in response to a similar inquiry by the Mediation Board, the railroad asserted that the Union's invocation of mediation pursuant to its "purported Section 6 notice" was "in clear violation of . . . the Agreement and, consequently, of the Railway Labor Act." Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50, is precisely in point here. It forecloses the railroad, which positively rejected mediation, from claiming an injunction against a strike.

When this opinion came to this point it was cir-

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[5] This is readily understood when we recall that the "White House Agreement" as framed was nation-wide covering many carriers. The possible desirability of modifications on separate railroad systems seems apparent. Indeed, the very loose and very general language of the earlier agreement does not readily lend itself to "interpretation."

culated. The dissenting opinion followed. The author assumes full responsibility for having through the opinion's inadequacy evidently led the author of the dissent to misunderstand completely the thrust of the court's opinion. A reference to the dissent's concluding paragraphs indicates that the dissent proceeds upon the theory that the primary basis for the court's opinion is the fact that the Union labeled its notice as one made in accord with § 6 of the Railway Labor Code. This circumstance is mentioned in the opinion but it concerns no more than the intent with which the Union served its notice; there is no suggestion that its reference to § 6 determined its character.

We state and reemphasize the following propositions:

1. The original agreement was no part of the compulsory arbitration arrangement referred to in the cases cited in the earlier portion of this opinion. It was referred to as the "White House Agreement" but it had no more impact or finality than any other collective bargaining agreement arrived at through negotiations between union and employer.

2. Section 6 of the Railway Labor Act (45 USC § 156) provides for the very thing the Union was seeking here. To use the language of Elgin, J. & E.R. Co. v. Burley, supra, the Union was attempting "the formation of collective agreements" and making "efforts to secure" something it did not have. The issue was "not whether an existing agreement controls

the controversy." The Union's efforts, it disputes, "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." It is immaterial whether the previously existing collective bargaining agreement specifies a particular method of settling disputes such as that found in Article VII, which is quoted in the dissent; such a stipulation, like any other stipulation in a labor agreement, may be amended as positively provided in § 6, and no act or agreement of the parties may limit, qualify or take away the right of one party to propose or attempt "the acquisition of rights for the future."

3. The provisions of § 1 Article II of the original agreement, quoted above, are so indefinite that it is doubtful if it is susceptible of a meaningful interpretation. The only description it gives of lodging or allowances are found in the words "suitable lodging" and "equitable allowance." In the nature of the case, these phrases suggest further negotiations between the parties. An adjustment board is in no position to define what is "suitable" or "equitable." And the section itself says as much, when it says: "Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis." "Worked out" surely means "negotiated for." And so the Union here, desiring to acquire specific "rights for the future," made this specific proposal in its August 3 notice. It is not suggested that such a change or addition to the agreement could be accomplished by unilateral action. What § 6 provides for is a means for proposing a change

or, as stated in the Elgin case, supra, a mode for making efforts that "look to the acquisition of rights for the future." The Mediation Board may attempt to mediate any unresolved dispute over such a proposal (§5; 45 USC § 155) and attempt to induce the parties to arbitrate, failing which, in the absence of an Emergency Board (§ 10; 45 USC § 160) the parties are "relegated to self-help" and free to exercise it. Locomotive Engineers v. B. & O.R. Co., supra, at pp. 289-291.

4. Any other interpretation of the situation here would mean that the Union would be completely at the mercy of the Adjustment Board which would be at liberty under its compulsory arbitration powers to accept and enforce the contentions of the railroad regardless of what the Union may do or say. This is the interpretation insisted on in the dissent. The only reasonable interpretation of the facts and the law here is that the Union is not compelled to leave itself open to compulsory arbitration as to the meaning of indefinite terms like "suitable" or "equitable." Therefore, under § 6 of the Act the Union may seek a change in the terms of the original contract.

5. That is precisely what the Union sought here. The Union made the proposal which it had the statutory right to do. The proposal was that there be added to the contract which merely called for something "suitable" or "equitable" a new provision stating in specific and precise terms just what the

Union members should be entitled to in respect to lodging. That what is proposed is not an interpretation but something new is plain from a reading of the terms stated by the Union. These provisions "look to the acquisition of rights for the future." These new terms called for a "large single" room; "well ventilated" rooms; "heated" rooms; "air conditioned" rooms; "well finished wood or carpeted floors"; "closet or large locker storage space"; "chairs and dresser," "standard bed"; it specified a type of "mattress and springs," "linen to be changed," location "not more than one-quarter miles," "suitable transportation," "call service," "allowance of $6.00." All these things are foreign to the paragraph of the original agreement which deals with the subject of lodging. In our view this is obviously something new. It is a change of the character contemplated by §6.

It appears to be implicit in the dissenting opinion that because of Article VII of the original agreement, or for some other reason, the Union had no right to make or propose a change in the working conditions in the respects here involved. That cannot be.

It follows from our holding that the dispute here involved was a "major" one that the grant of an injunction was improper.

The judgment is reversed.

DUNIWAY, Circuit Judge:

I dissent. In my opinion the dispute is a minor dispute falling under section 3, not a major dispute falling under section 6. I cannot quarrel with my brother Pope's opinion as an exercise in judicial logic. It says that the union's notice of August 3, which refers to section 6 of the Act, sought "a change in agreements affecting rates of pay, rules or working conditions" (section 6). Hence a dispute falling within section 6 was created. My difficulty is with his premise. It is a too simple solution of a complex problem. It seems to me to disregard what I consider basic, the language and the purpose of the 1964 White House Agreement, as well as the purpose of sections 3 and 6.

Two provisions of that agreement, which was a nationwide settlement following threat of a most serious nationwide strike, are particulary pertinent here. With specific reference to the away-from-home expenses of train crews, Article II, Section 1 of the Agreement provides:

> "When the carrier ties up a road service crew (except short turnabout passenger crews), or individual members thereof, at a terminal (including tie-up points named by assignment bulletins, or presently listed in schedule agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew assignment for four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in

lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to provide lodging.

"If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements, the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

"The provisions of this section shall be made effective at a date no later than 30 days following the effective date of this Agreement."

This was as definite a settlement of this issue, on a national basis, as could be made. Local conditions vary widely; therefore this provision was to be "worked out" locally. But there is no indication that these matters were to be "worked out" outside the definitions and limitations laid down in the agreement itself; "suitable lodging" or an "equitable allowance," and the latter "only if it is not reasonably possible to provide lodging," plus a requirement that existing allowance in lieu of lodging is to be removed if "suitable" lodging is supplied. Under the agreement the carrier is required to provide lodging or an allowance. All that remains is to determine what lodging is "suitable" and "reasonably possible to provide," and what allowance is "equitable." Surely this requires that when the parties undertake to work these matters out on a local basis, they do so within those definitions and limitations.

To say that defining what lodging is "suitable" and what allowance is "equitable" under a given set of circumstances is not "interpretation" within the meaning of section 3, is to me a far too restrictive view of what "interpretation" means, in the context in which it is used in section 3. And to say that working out these matters is not "application" within the meaning of section 3, is also, to me, a far too restrictive view of what "application" means in that context.

I think that the parties to the White House Agreement intended that this type of dispute be a section 3 dispute. Article VII of that agreement provides:

> "Any dispute involving the interpretation or application of this agreement shall be settled by the parties in accordance with the established procedures therefor, *including the creation of Special Boards of Adjustment and other procedures of Section 3 of the Railway Labor Act.*" (Emphasis added)

What happened here is completely consistent with an attempt to interpret and apply Article II, Section 1 of the Agreement. Being unable to reach an agreement as to what lodging was "suitable" and what allowance was "equitable," the carrier, by its July 24 notice, put into effect its version, which states what accommodations it will provide and what allowance in lieu thereof it will pay. The union's August 3 notice, while stated to be "in accord with section 6," is in fact no more than a

statement of its version of what shall constitute "acceptable suitable lodging" and what shall be "an equitable allowance." These are the terms used by the union. They are also the terms used in Article II, Section 1. They are nothing but an attempt to interpret and apply the White House Agreement.

The reference in the union's notice to section 6, when the notice itself discloses that that section is not applicable, cannot, in my opinion, change what is in fact a section 3 dispute into a section 6 dispute.[1] This is because section 6 is appplicable only if there is to be a "*change in agreements* affecting rates of pay, rules, or working conditions" (emphasis added). Here the union can perhaps be said to have sought a change in "rules" or "working conditions," and even in "rates of pay" as to the in lieu allowance. But it sought them *within* the White House Agreement; it sought interpretation and application of that agreement; it did not seek a "change in [that] agreement."

I think that it is a disservice to the cause of peaceful settlement of railway labor disputes, as carefully worked out in section 3, to hold that a union can so easily escape its obligations by merely labelling a section 3 dispute a section 6 dispute. I also think that in the White House Agreement both parties agreed and intended that this dispute be a section 3 dispute, as is witnessed by Article VII.

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[1] "The voice is Jacob's voice, but the hands are the hands of Esau." (Genesis XXVII, 22). Isaac was blind. This court is not, nor does the law require that it act as if it were!

I do not think that the union should now be permitted, by a mere verbal device, to repudiate and disrupt so important an agreement.

I would affirm.

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